

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MICROSOFT CORPORATION,

Plaintiff,

v.

DATATERN, INC.,

Defendant.

CIVIL ACTION NO. 1:11-cv-02365-KBF
CIVIL ACTION NO. 1:11-cv-02648-KBF

SAP AG and SAP AMERICA, INC.,

Plaintiff,

v.

DATATERN, INC.,

Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO
FILE EXPERT WITNESS REPORT OF NEERAJ GUPTA UNDER SEAL**

Pursuant to §§ 7.3 and 14.3 of the Protective Order entered on April 23, 2012 in the above-captioned consolidated matters (“Protective Order”), DataTern, Inc. (“DataTern”) files this brief memorandum of law in support of its motion file under the seal the “Expert Witness Report of Neeraj Gupta Opening Report On Infringement,” dated August 29, 2012 (“Gupta Report”), in support of its Memorandum in Support of Motion for Entry of Declaratory Judgment And For Dismissal Without Prejudice of Plaintiffs’ Invalidity Claims (“Memorandum in Support of Motion for Entry of Judgment”).

(1) As the Memorandum in Support of Motion for Entry of Judgment states, the Gupta Report is a one hundred forty nine page (149) analysis of the infringement issues in this

matter. In support of its conclusions, the Gupta Report relies upon and cites portions of source code information contained in certain software products manufactured, sold and/or distributed by Microsoft and SAP.

(2) As set forth in §§ 7.3 and 14.3 of the Protective Order, the source code contains proprietary and highly confidential information which may not be filed in the public record.

(3) This jurisdiction has recognized previously that documents containing or discussing source code must be protected from public disclosure in order to prevent competitors from using the information to gain an unfair advantage in the marketplace over the parties. *See Avocent Redmond Corp. v. Raritan Americas, Inc.*, No. 11-6100, 2012 WL 3114855, at *16 (S.D.N.Y. July 31, 2012) (“The parties may file [certain enumerated] documents under seal because they include engineering schematics, confidential source code and confidential deliberations about future products, the disclosure of which could unfairly allow competitors to develop competing products”).

(4) Pursuant to § 14.3 of the Protective Order, Fed. R. Civ. P. 5.2, the ECF Rules and the Sealed Records Filing Instructions found at http://nysd.uscourts.gov/cases_records.php?records=sealed_records, DataTern will file a CD of the Gupta Report under seal if the Court allows this Motion.

CONCLUSION

For the foregoing reasons, DataTern respectfully requests that the Court allow DataTern’s Motion so that DataTern may file the Gupta Report under seal.

Respectfully submitted,

DATATERN, INC.,
By its attorneys,

/s/ Lee Carl Bromberg

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Dated: September 7, 2012

CERTIFICATE OF SERVICE

I certify that, on this 7th day of September, 2012, I served copies of DataTern, Inc.'s Memorandum In Support of Motion to File Under Seal upon counsel of record for the other parties in the above-referenced consolidated matters via ECF, with courtesy copies served via electronic mail.

/s/ Lee Carl Bromberg

Lee Carl Bromberg